89-771

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, BOARD OF REGENTS OF THE STATE OF LOUISIANA, BOARD OF TRUSTEES FOR LOUISIANA STATE COLLEGES AND UNIVERSITIES, AND BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the existence of predominantly white and predominantly black public institutions of higher education alone forms an adequate basis for a finding of liability under Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment to the Constitution of the United States, in a formerly *de jure* state, under circumstances in which:

   a. all such institutions have been open to all qualified applicants, regardless of race, for more than twenty-five years;

   b. extensive good faith efforts have been undertaken by the state to increase racial diversity in the institutions;

   c. no racial discrimination is alleged to have occurred since the end of the *de jure* era; and

   d. the current racial composition of the institutions is solely the product of unfettered student choice.

2. Whether there is an adequate record in the court below to support, as a remedy, the merger of the Louisiana State University Paul M. Hebert Law Center and the Southern University Law Center, where no party presented that issue to the trial court, no party recommended that remedy and no evidence was taken regarding the feasibility, appropriateness or educational soundness of such a merger.

PARTIES TO THIS ACTION

The parties in the proceedings before the three-judge district court which are not listed in the above caption are:

1. The Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University"), defendant;

2. The Louisiana State Board of Elementary and Secondary Education, defendant;

3. The St. Bernard Parish School Board, defendant;

4. The Bossier Parish School Board, defendant;

5. The State Superintendent of Public Education, defendant;

6. The Superintendent of Schools for Bossier Parish, defendant; and,

7. The Superintendent of Schools for St. Bernard Parish, defendant.*

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* The defendants listed above as 2 through 7 were added by the plaintiff United States for their supervisory roles over the Bossier Parish Community College and the St. Bernard Parish Community College. *United States v. Louisiana*, 692 F. Supp. 642, 647 (E.D. La. 1988), Order and Reasons on Summary Judgment ("Order and Reasons I"), Joint Appendix to Jurisdictional Statement filed by the Louisiana Attorney General and Southern University, Nos. 89-556 and 557, ("Joint Appendix") at 10a-11a. *See also* Amended Complaint filed November 12, 1980 ("Amended Complaint"), Joint Appendix at 166a-67a. The parties named in the caption and listed in 1, 2, 3 and 4 were parties to the consent decree entered into and approved by the lower court on September 8, 1981 ("Consent Decree"). Consent Decree, Joint Appendix at 237a. The Bossier Parish School Board, joined by the Louisiana State Board of Elementary and Secondary Education, filed a motion for summary judgment which was granted by the court. *Louisiana*, 692 F. Supp. at 659, Order and Reasons I, Joint Appendix at 38a. Although no motions for summary judgment were filed by those parties listed above in 3, 5, 6 and 7, none of those parties was included in the trial court's orders.

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JURISDICTIONAL STATEMENT

The State of Louisiana (the "State"), through its Governor, Charles E. "Buddy" Roemer, III, the Board of Regents of the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees"), and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), appeal from the judgment of the three-judge United States District Court for the Eastern District of Louisiana dated August 2, 1988, Order and Reasons on Summary Judgment ("Order and Reasons I"), Joint Appendix at 3a, holding the State, Regents, Trustees, LSU and the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University") (collectively the "defendants") liable for violating Title VI of the Civil Rights Act of 1964 §§ 601 and 602 (codified as amended, 42 U.S.C. §§ 2000d, 2000d-1 (1982)) ("Title VI"), because the court found the institutions of public higher education in Louisiana to be racially identifiable. *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988), Order and Reasons I, Joint Appendix at 34a.

The State, Regents and LSU also appeal from those portions of the judgments entered by the three-judge district court on July 19, 1989, entitled Opinion and Order, Joint Appendix at 50a, 60a-62a, 71a-73a, and August 4, 1989, entitled Order and Reasons ("Order and Reasons II"), Joint Appendix at 78a, and Supplemental Order, Joint Appendix at 105a, and Reasons for Ruling, Joint Appendix at 92a-96a, ordering the merger of the LSU Paul M. Herbert Law Center and the Southern University Law Center. Should this Court determine that liability does exist, the State, Regents, Trustees and LSU support all other aspects of the trial court's remedy. Because none of its constitutent institutions is involved, Trustees takes no position with respect to the merger of the law schools.

OPINIONS BELOW

Order and Reasons I is reported at *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988). Order and Reasons I, Joint Appendix at 3a. Opinion and Order is reported at *United States v. Louisiana*, 718 F. Supp. 499 (E.D. La. 1989). Opinion and Order, Joint Appendix at 39a. Order and Reasons II and Supplemental Order are reported at *United States v. Louisiana*, 718 F. Supp. 521 (E.D. La. 1989). Order and Reasons II and Supplemental Order, Joint Appendix at 78a and 105a. Reasons for Ruling is reported at *United States v. Louisiana*, 718 F. Supp. 525 (E.D. La. 1989). Reasons for Ruling, Joint Appendix at 81a.

JURISDICTION

The complaint filed by the United States ("the Government") on March 14, 1974 ("Complaint"), alleges that the State and its various boards and agencies governing public higher education in Louisiana violated Title VI and the Fourteenth Amendment.[1] Complaint, Joint Appendix at 153a. On motion by the Government, pursuant to 28 U.S.C. 2281 (1970) (repealed 1976) and 28 U.S.C. § 2284 (1982), a three-judge district court was convened on March 28, 1974. Request for a Three-Judge Court, Joint Appendix at 184a; Memorandum In Support of the Request for a Three-Judge Court, Joint Appendix at 185a; Order, Joint Appendix at 197a. Jurisdiction was proper under 28 U.S.C. § 1345 (1982) and 42 U.S.C. §§ 2000d, 2000d-1 (1982). *Louisiana*, 692 F. Supp. at 646, Order and Reasons I, Joint Appendix at 10a.

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[1] Although the Government brought suit under the Fourteenth Amendment as well as Title VI, the court limited its holding to Title VI. The defendants disputed whether the Government had standing to assert claims directly under the Fourteenth Amendment. The court declined to rule on the standing question because it viewed the relief available in a school desegregation suit brought under the Fourteenth Amendment to be identical to that available to the Government under Title VI. *Louisiana*, 692 F. Supp. at 649-50, Order and Reasons I, Joint Appendix at 16a-17a.

On August 2, 1988, the three-judge district court granted the Government's motion for partial summary judgment, finding the defendants liable for violating Title VI. *Louisiana*, 692 F. Supp. at 658-59, Order and Reasons I, Joint Appendix at 37a-38a. The court entered its judgment on July 19, 1989, ordering the implementation of a remedial plan to desegregate public higher education in Louisiana. *Louisiana*, 718 F. Supp. at 499, Opinion and Order, Joint Appendix at 39a.

On August 4, 1989, the court ruled on motions for a new trial, motions to alter or amend judgment and motions to grant a stay pending appeal submitted by Southern University,[2] Grambling State University ("Grambling") Alumni Association as *amicus*,[3] the Louisiana Attorney General[4] and the Government.[5] *Louisiana*, 718 F. Supp. at 521, Order and Reasons II and Supplemental Order, Joint Appendix at 78a, 105a. On August 18, 1989, this Court granted Southern University's application and the Louisiana Attorney General's motion for stay of judgment. *Louisiana ex rel. Guste v. United States*, 110 S. Ct.

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[2] Motion for a New Trial and/or Motion to Alter or Amend Judgment; Notice of Motion; Memorandum in Support Thereof, Joint Appendix at 739a; Memorandum in Support of Motion for Stay of Execution of Judgment Pending Motion for a New Trial and/or to Alter or Amend Judgment; Alternative Motion for Stay and Execution of Judgment Pending Appeal With Affidavits (corrected copy), Appendix at 73a. Appendix refers to the Appendix submitted simultaneously with this Jurisdictional Statement filed by the State, through its Governor, Regents, Trustees and LSU.

[3] Motion and Memorandum to Amend or Alter Order Under Rule 59(e), Joint Appendix at 779a.

[4] Notice to Join in Motion of Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment, Appendix at 85a; Motion to Withdraw "Notice to Join in Motion of Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record, Appendix at 87a; Order, Appendix at 91a.

[5] United States' Motion for Reconsideration and to Alter or Amend Judgment, Joint Appendix at 785a.

18 (1989), Order in Pending Case, Joint Appendix at 2a. The State, Regents, Trustees and LSU filed a timely notice of appeal to this Court on September 29, 1989 in the United States District Court for the Eastern District of Louisiana. Notice of Appeal, Appendix at 210a.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1253 (1982) and 28 U.S.C. §§ 2281, 2284. *See* discussion *infra* at 8.[6]

CONSTITUTIONAL PROVISIONS AND RULES

The following is a list of constitutional provisions, statutes, ordinances and regulations involved in this case and the appropriate appendix reference for each:

1. U.S. Const. amend. XIV, § 1, reprinted in Appendix at 92a.
2. 28 U.S.C. § 1253 (1982), reprinted in Joint Appendix at 109a.
3. 28 U.S.C. § 1345 (1982), reprinted in Appendix at 94a.
4. 28 U.S.C. § 2281 (1970) (repealed 1976), reprinted in Joint Appendix at 109a.
5. 28 U.S.C. § 2282 (1970) (repealed 1976), reprinted in Joint Appendix at 109a.
6. 28 U.S.C. § 2284 (1982), reprinted in Joint Appendix at 110a.
7. 42 U.S.C. § 2000d (1982), reprinted in Joint Appendix at 115a.
8. 42 U.S.C. § 2000d-1 (1982), reprinted in Appendix at 95a.
9. Pub. L. No. 94-381, §§ 1, 7, 90 Stat. 1119, 1120 (1976), reprinted in Joint Appendix at 112a.
10. La. Rev. Stat. Ann. §§ 17:3121-3133, 3201-3383, reprinted in Joint Appendix at 126a-52a, 1048a-67a.

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[6] The Government has suggested that a three-judge district court may not have been required under 28 U.S.C. § 2281. Memorandum for the United States in Opposition to Applications to Stay (Nos. A-126 and A-127) (filed August 15, 1989) at 11-13.

11. La. Const. art. VIII, §§ 5-7, reprinted in Joint Appendix at 117a.

STATEMENT OF THE CASE

The Government brought this action in 1974, alleging that the State and its various boards and agencies governing public higher education in Louisiana violated Title VI and the Fourteenth Amendment. The Government filed a motion for a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. 28 U.S.C. §§ 2281, 2284, Joint Appendix at 109a, 184a. A three-judge district court was convened. Order, Joint Appendix at 197a. On September 8, 1981, without any admission of liability on the part of the defendants, the parties to this action entered into the Consent Decree which was approved by the court.[7] Consent Decree, Joint Appendix at 199a, 256a. *See also Louisiana*, 692 F. Supp. at 647, Order and Reasons I, Joint Appendix at 11a. In December 1987, just prior to its expiration and in accordance with the terms of the Consent Decree, the Government filed a motion for a hearing to determine whether a unitary system of higher education in Louisiana had been achieved. *Louisiana*, 692 F. Supp. at 648, Order and Reasons I, Appendix at 14a-15a. The court never conducted the hearing but rather requested motions for summary judgment. Minute Entry of March 31, 1988, Appendix at 5a. After motions for summary judgment, oppositions and cross-motions were filed, the trial court, on August 2, 1988, granted the Government's motion for partial summary judgment on the issue of liability finding various defendants liable for violating Title VI. *Louisiana*, 692 F. Supp. at 658-59, Order and Reasons I, Joint Appendix at 36a-38a.

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[7] The introduction to the Consent Decree provides in part: "It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitute an admission by defendants or an adjudication by the Court of any violation of law by defendants." Consent Decree, Joint Appendix at 200a.

The court then instructed the parties to submit proposed plans to desegregate public higher education in Louisiana. Minute Entry of October 7, 1988, Appendix at 7a. The State, while still contesting liability, but compelled to follow the orders of the court, submitted Proposed Plan to Desegregate the System of Public Higher Education in the State of Louisiana Submitted by Governor Charles E. "Buddy" Roemer, III on Behalf of the State of Louisiana ("the State Plan") to the court, which emphasized the replacement of Louisiana's current four public higher education governing boards with a single governing board which would be responsible for studying and implementing effective measures to desegregate further Louisiana's state colleges and universities.[8] The State Plan was premised on the Proposed Plan to Desegregate the System of Public Higher Education in the State of Louisiana, a report formulated by a bipartisan task force appointed by Governor Roemer, in response to the trial court's finding of liability. The purpose of this task force was to study the issues and propose a viable solution to the racial identifiability of Louisiana's public higher education institutions. *See* Final Report, Joint Appendix at 638. The Government and Southern University submitted separate desegregation plans which relied heavily on the substantial expenditure of so-called "enhancement" dollars by the State at the predominantly black institutions. The Special Master specifically noted and discussed the Government's and Southern University's reliance on the enhancement of predominantly black schools as a remedy. *See id.* at 641a, 645a.

The trial court, dissatisfied with the parties' failure to reach consensus on a plan, appointed Paul R. Verkuil, former Dean of Tulane Law School and current President of the College of William and Mary, as Special Master to take and consider evidence and draft a proposed plan for the court's consideration. Order of Ref-

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[8] For summary discussion of the State Plan, see Final Report, Joint Appendix at 637a.

erence of December 2, 1988, Appendix at 1a. Special Master Verkuil permitted the parties until January 20, 1989, to submit amended desegregation plans, if they wished, and until February 1, 1989, to submit direct evidence in the form of expert and lay witness reports in support of or in opposition to the various parties' plans.[9] After extensive discovery, which included the depositions of thirty-three witnesses, Final Report, Joint Appendix at 628a, the Special Master scheduled a hearing for March 6, 1989, during which expert and lay witnesses were to be cross-examined on their testimony. *Id.* at 627a. Shortly before the hearing was scheduled to begin, the parties engaged unsuccessfully in settlement negotiations. *Id.* at 629a. By agreement of all of the parties, in exchange for delaying the hearing for further settlement discussions, the depositions were offered into evidence in lieu of cross-examination, and only rebuttal testimony was presented in open court. *Id.*

Following this hearing, on April 18, 1989, the Special Master distributed his Recommended Remedial Plan and solicited comments from the parties. Minute Entry of April 18, 1989, Appendix at 11a. The parties filed responses to the Recommended Remedial Plan, Final Report, Joint Appendix at 629a, and the Special Master heard oral argument on the parties' proposed modifications. *Id.* The Special Master modified the Recommended Remedial Plan and submitted a Final Report on May 30, 1989, to the three-judge district court for its consideration. Final Report, Joint Appendix at 623a. The Special Master's Final Report substantially resembled the State Plan, supported by the State, Regents, Trustees and LSU.

The district court adopted the Special Master's Final Report almost in its entirety, and, on July 19, 1989, the court entered its Opinion and Order. *Louisiana*, 718 F.

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[9] Minute Entry dated December 16, 1988, Appendix at 9a. For a list of the 78 witnesses who submitted written direct testimony, see Final Report, Joint Appendix at 709a-15a.

Supp. at 499. Opinion and Order, Joint Appendix at 39a. However, unlike the Special Master's Final Report, the court in its order required the merger of the LSU Paul M. Hebert Law Center and the Southern University Law Center. *Louisiana*, 718 F. Supp. at 507, 513-15, 518-19, Opinion and Order, Joint Appendix at 50a, 60a-62a, 71a-73a. Prior to this time, merger of the law schools had not been an issue, no party had recommended that remedy and no party had presented evidence with respect to it.[10]

On August 4, 1989, the court ruled on post-trial motions submitted by Southern University, the Grambling Alumni Association and the Louisiana Attorney General. *Louisiana*, 718 F. Supp. 521, Order and Reasons II and Supplemental Order, Joint Appendix at 78a, 105a; *Louisiana*, 718 F. Supp. 525, Reasons for Ruling, Joint Appendix at 81a. *See also supra* notes 2-4. After the court denied Southern University's motion for stay, Southern University and the Louisiana Attorney General filed, respectively, an application for stay and motion for stay with this Court. The Government and the State opposed the application and motion, but on August 18, 1989, the Court granted the stay.

The State, Regents, Trustees and LSU filed a Notice of Appeal to this Court in the district court on September 29, 1989.

DISCUSSION OF JURISDICTION

This Court "[has] jurisdiction under 28 U.S.C. § 1253 only if a three-judge court was required by 28 U.S.C. § 2281."[11] *Chapman v. Meier*, 420 U.S. 1, 13 (1975).

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[10] For a discussion of evidence presented by the parties on the general issue of merger, see Final Report, Joint Appendix at 647a.

[11] 28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by

Under 28 U.S.C. § 2281, a three-judge district court is required when a party seeks "[a] . . . permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute . . . ." [12]

Although this Court has strictly construed 28 U.S.C. § 2281, *see Allen v. State Board of Elections*, 393 U.S. 544, 561 (1959), "[it has] not been unaware of the legitimate reasons that prompted Congress to enact three-

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any Act of Congress to be heard and determined by a district court of three judges.

As observed by this Court, "[p]erhaps the oddest feature of § 1253 is that it conditions this Court's appellate jurisdiction on whether the three-judge court was correctly convened." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 95 n.12 (1974). Thus, "in struggling to make workable sense of [sections 1253, 2281, and 2282, this] Court has not infrequently been induced to retrace its steps." *Id.* at 96.

Commentators attribute the Court's struggle with these sections to the large number of cases heard by three-judge courts. *See, e.g.*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4040 (2d ed. 1988) [hereinafter "17 *Wright & Miller*"]; 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* (2d ed. 1989) ¶ 421.03[2]. For example, in 1970, there were 291 three-judge court hearings; in 1971, 318; in 1972, 310; and in 1973, 320. Ann. Rep., Administrative Office of the United States Courts, 1974, p. 241, Table 58, Appendix at 185a.

One leading treatise suggests that, as a step toward alleviating the confusing case law which has resulted from this struggle, "[j]udgments entered by the three-judge court should be subject to review by the Supreme Court, without regard to whether a three-judge court was actually required." 17 *Wright & Miller*, *supra*, § 4040, at 139.

[12] Although 28 U.S.C. § 2281 was repealed, Pub. L. 94-381, § 1, 90 Stat. 1119 (1976), Joint Appendix at 112a, it still applies "to any action commenced on or before the day of enactment [August 12, 1976]." Pub. L. 94-381, § 7, 90 Stat. 1120, Joint Appendix at 114a. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 30 n.1 (1980). This action was commenced on March 14, 1974.

judge court legislation." *Id.* at 562. Specifically, this Court has observed:

> Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. . . . It authorizes direct review by this Court, 28 U.S.C. § 1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the courts to the Supreme Court . . . .
>
> . . . .
>
> . . . [T]he purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation . . . is delayed while the proper composition of the tribunal is litigated.

Swift & Co. v. Wickham, 382 U.S. 111, 119-120, 124 (1965). *See also MTM, Inc. v. Baxley*, 420 U.S. 799, 805 (1975) (White, J., concurring) ("[The three-judge court] procedure was adopted to protect state statutes from improvident injunctions issued by a single federal judge on federal constitutional grounds."). The Court has also concluded that "[n]otwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration." [13] *Allen*, 393 U.S. at 562.

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[13] Due to the repeal of 28 U.S.C. §§ 2281, 2282, few judicial administration problems exist today. In fact, "[t]he docket pressures that compelled distortion of § 1253 do not persist." 17 *Wright & Miller, supra* note 11, § 4040, at 142. For example, in 1988, ten hearings concerning civil rights cases were held before three-judge courts. Ann. Rep., Director of the Administrative Office of the United States, 1988, p. 129, Table S-22, Appendix at 187a. In 1973, however, there were 183 hearings involving civil rights cases. Ann. Rep., Administrative Office of the United States Courts

This case presents the very issues which 28 U.S.C. § 2281 was intended to address because "if successful, [this case] would render void state statutes embodying important state policies." *Swift & Co.*, 382 U.S. at 119. The three-judge district court rendered void a number of state statutes and sections of the Louisiana Constitution which embody important state policies concerning Louisiana's higher education system. Moreover, the remedy in this case involves not merely a "potential for substantial interference with government administration," *Allen*, 393 U.S. at 562, but rather actual substantial interference with the structure of Louisiana's higher education system as well as the administration of that system.

Equally important, this case falls squarely within the parameters of 28 U.S.C. § 2281 established by this Court:

> In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'"

Morales v. Turman, 430 U.S. 322, 323, *reh'g denied*, 430 U.S. 988 (1977) (quoting *Phillips v. United States*, 312 U.S. 246, 251 (1941)).[14]

1974, p. 241, Table 58, Appendix at 185a. (Both numbers include suits challenging the constitutionality of state statutes.)

[14] In *Morales*, the petitioners had alleged that inhumane conditions in juvenile delinquent facilities in Texas violated the Constitution. The district court found for the petitioners but the court of appeals vacated that decision, holding that a three-judge court was required under 28 U.S.C. § 2281. The court of appeals reasoned that "the challenged, unwritten practices of the [Texas officials] were revealed during trial to be statewide in impact and that therefore they were equivalent to a statute with statewide applicability within the meaning of § 2281." *Morales*, 430 U.S. at 323. This Court, in reversing the court of appeals, found that "the single District Judge properly exercised jurisdiction to decide

The Government should not now be heard to complain that a three-judge court was not appropriate in this case.[15] The Government has repeatedly contended throughout this litigation that various state statutes and sections of the Louisiana Constitution locked the State and its boards into a dual system of black and white schools that violated Title VI and the Constitution. In its Complaint filed on March 14, 1974, the Government alleged:

> Pursuant to State law, defendant Louisiana Coordinating Counsel for Higher Education has developed, proposed and submitted to State Officials a report titled *Master Plan Toward Balanced Growth in Louisiana Posthigh School Education: Quantity and Quality*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

Complaint, Joint Appendix at 162a.[16] The Government clarified its position and further highlighted the necessity of a three-judge court in this case in a response to interrogatories filed by the State and its boards:

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this case, and that his judgment is reviewable on the merits in the Court of Appeals." *Id.* at 324.

[15] *See supra* note 6.

[16] In its Amended Complaint, the Government changed this allegation to reflect the constitutional creation of Regents in 1974. Paragraph 33 of the Amended Complaint alleges that "[p]ursuant to State law, defendant Louisiana Board of Regents has developed and proceeded to implement, a document entitled *The Master Plan For Higher Education in Louisiana*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana." Amended Complaint, Joint Appendix at 176a.

Under the Louisiana Constitution of 1974, Regents "is the public body vested with the authority and power to formulate, to revise and to adopt a Master Plan for Higher Education in Louisiana." Op. La. Att'y Gen. No. 77-1379 (Oct. 7, 1977). Additionally, "the Master Plan for Higher Education in Louisiana as finally adopted by the Board of Regents does not require legislative approval." *Id.* Thus, when adopting a Master Plan, Regents acts as a legislative body.

> The [Government] does contend that both the adoption and implementation of the Louisiana Master Plan of 1978 have contributed to the perpetuation of Louisiana's dual system of higher education, and to the extent that the Master Plan does perpetuate the dual system, it does in fact violate Title VI and the Fourteenth Amendment.
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> . . . .
>
> The [Government] does contend that some of the provisions of the Louisiana Constitution of 1974 have been implemented in manner to perpetuate the racially dual system of public higher education which existed prior to the time the Louisiana Constitution was adopted and continues to exist at the present time.

United States' Answers to Interrogatories Propounded by Defendants, Appendix at 69a. The Government also specifically alleged that the "Louisiana Constitution of 1974, Article 8, Sections 5, 6, and 7" perpetuated a dual system of public higher education in Louisiana. *Id.* at 68a.

In effect, therefore, the Government has consistently argued since 1974 that numerous provisions of the Louisiana Constitution and various state statutes pertaining to higher education are unconstitutional as applied.[17] The Government in its own pleadings has stated that "in the Complaint filed by the government in the instant case, the United States seeks relief . . . which will enjoin the practices of Louisiana as applied and interpreted by the defendants and their agents." Request For A Three-Judge Court, Joint Appendix at 193a-94a.

The three-judge district court accepted the Government's invitation to strike down whole provisions of Lou-

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[17] This Court has held that "[o]ur cases . . . establish that a statute or a rule may be held unconstitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

isiana statutory and constitutional law. In its Order and Reasons II, the district court attacked the four higher education governing board system established by the Louisiana Constitution of 1974: "We observe, however, that the segregation maintained by the four board system is incompatible with any suggestion that the four board system retains viability." *Louisiana*, 718 F. Supp. at 523, Order and Reasons II, Joint Appendix at 79a. Earlier, the three-judge court had concluded that the four board system violated the federal Constitution:

> A truism thus emerges: The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case. The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution. . . .
>
> Statistics regarding student performance . . . demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education.

Louisiana, 718 F. Supp. at 505, Opinion and Order, Joint Appendix at 45a.

For these reasons, 28 U.S.C. § 2281 and a three-judge court are appropriate for this case. Decisions yielding a contrary result, such as *Morales* and *Costello v. Wainwright*, 430 U.S. 325 (1977), are distinguishable and inapposite. As previously discussed, in *Morales*, the petitioners had alleged that the practices of the defendants violated their constitutional rights. *See supra* note 14. Although the court of appeals found that "there appeared to be no central body of *written* regulations governing [the defendants'] institution," it still held that a three-judge court was required. *Morales v. Turman*, 535 F.2d 864, 871 (5th Cir. 1976), *rev'd* 430 U.S. 322, *reh'g denied*, 430 U.S. 988 (1977) (emphasis added). This Court reversed after applying the broad definition of "statute" contained in *Phillips*, 312 U.S. at 251, finding that "[it]

ha[d] never considered the generalized, *unwritten* practices of administration to be equivalent to the 'delegated legislation' of an administrative board.'" *Morales*, 430 U.S. at 323 (emphasis added). Therefore, 28 U.S.C. § 2281 did not apply.

In *Costello v. Wainwright*,[18] this Court found that "the applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative *behavior* ultimately impinges on duties imposed under concededly constitutional state statutes." *Costello*, 430 U.S. at 326 (emphasis added). Because the plaintiff had only alleged that administrative behavior was unconstitutional, the Court reversed the circuit court's holding that at three-judge court was required.

Neither *Morales* nor *Costello* apply to the facts of this case. This case, unlike *Morales*, does not involve "challenged, unwritten practices of administration." *Morales*, 430 U.S. at 323. Here state officials have acted under written authority, both statutory and constitutional. Indeed, the Government has argued that "the defendants and their agents have proposed and implemented policies, practices and regulations pursuant to their statutory authority which have maintained and perpetuated an unlawful Statewide dual system of public higher education on the basis of race." Request For a Three-Judge Court, Joint Appendix at 187a n.5. This case also does not involve a situation, as in *Costello*, in which a party has requested "an equitable remedy for unconstitutional state

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[18] The Fifth Circuit in *Costello* vacated the single district court judge's decision and held that a three-judge court was required "because . . . the possible temporary suspension of an otherwise valid state statute to effectuate federally mandated relief [was the] equivalent to finding that statute unconstitutional." *Costello*, 430 U.S. at 326. The petitioners in *Costello* had alleged that the overcrowding of Florida prisons violated their constitutional rights. The district court agreed and attempted to relieve the overcrowding by issuing a preliminary injunction which might have caused Florida officials to violate their statutory duties. *Id.*

administrative behavior." *Costello*, 430 U.S. at 326. As detailed earlier, the Government has based its claim of unconstitutionality on more than just mere behavior by alleging that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment.

The Court should hear this case on direct appeal. 28 U.S.C. § 2281 undeniably applies. Louisiana's entire system of public higher education, as well as the state constitutional and statutory provisions through which that system is implemented, are affected by this lawsuit, and all of higher education in Louisiana is awaiting final resolution. Until this litigation is resolved, the operation of Louisiana's colleges and universities remains subject to extraordinary confusion and instability. Indeed, this Court's own admonition that "[28 U.S.C. § 2281] should not be interpreted in such a way that . . . litigation is delayed while the proper composition of the tribunal is litigated," *Swift & Co.*, 382 U.S. at 124, has never been more appropriate, especially now that this Court's docket is no longer burdened by a large number of direct appeals from three-judge district courts.[19]

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this case are unquestionably substantial. They arise under the purview of Title VI, which prohibits the allocation of federal funds to public institutions that discriminate on the basis of race. These important and novel issues go far beyond those already considered by this Court in education desegregation cases and involve questions of both liability and remedy.

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[19] As noted, in 1988, only ten hearings involving civil rights were held before three-judge district courts. *See supra* note 13. One commentator has suggested that "[w]ith three-judge courts now virtually eliminated, it is to be hoped that the provision for direct appeal will be given a straight forward reading shorn of the complications introduced by the recent cases." 17 *Wright & Miller*, *supra* note 11, § 4235, at 626.

I. LIABILITY STANDARD

A. The Court Has Not Yet Determined The Standard For Liability For Public Higher Education Desegregation Cases

It is well-settled law that state statutes which on their face segregate public institutions on the basis of race are unconstitutional and that "separate but equal" educational institutions do not satisfy the constitutional requirement of equal protection. *See Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Consequently, states must adopt and implement racially non-discriminatory policies and practices in the realm of both elementary and secondary as well as higher education.[20] Lower courts also agree that, as in the context of public elementary and secondary education, states have an affirmative duty to dismantle *de jure* systems of higher education.[21] The extent of this duty has been adjudicated on the elementary and secondary school level in *Green v. School Board*, 391 U.S. 430 (1968). It has not, however, been determined by this Court in the context of higher education. Moreover, these issues are not merely of academic interest. In addition to this case, similar litigation is currently pending at the trial or appellate level in Alabama[22] and

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[20] *See Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, *reh'g denied*, 351 U.S. 915 (1956) (black applicant entitled to prompt admission to graduate program under rules and regulations applicable to other qualified applicants).

[21] *See, e.g., Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979); *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal docketed*, No. 88-4103 (5th Cir. Feb. 11, 1988); *United States v. Alabama*, 628 F. Supp. 1137 (N.D.Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom.* 108 S. Ct. 2857 (1988); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom. Board of Visitors v. Norris*, 404 U.S. 907 (1971).

[22] *See United States v. Alabama*, 628 F. Supp. 1137. After a trial and ruling on liability, the Eleventh Circuit disqualified the trial judge, reversed and remanded the case for a new trial. *Alabama*, 828 F.2d at 1552.

Mississippi,[23] and all Southern states are under one form or another of federal supervision over their higher education systems' compliance with Title VI.[24]

A comparison of the result and analysis of liability in *Green* to the result and analysis of liability in *Bazemore v. Friday*, 473 U.S. 395 (1986) (White, J., concurring), illustrates vividly why definitive answers to these questions are required from this Court. In *Green*, this Court held that merely instituting a "freedom of choice" plan in elementary and secondary education was not enough to satisfy the school board's duty to abolish its segregated system. *Green*, 391 U.S. at 439-441. In *Bazemore*, despite the remaining racial identifiability of university-sponsored clubs, five Justices of this Court found that implementing a racially nondiscriminatory, neutral admission policy for club membership was sufficient action by the state to overcome claims of unconstitutionality. There was no liability present in *Bazemore* because the Justices determined that the racial identifiability of the clubs was the result of voluntary and unfettered choice exercised by the student applicants.

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[23] *Ayers v. Allain*, 674 F. Supp. 1523, the Mississippi higher education desegregation case currently on appeal before the United States Court of Appeals for the Fifth Circuit, is strikingly similar to the instant case. The trial and analysis in *Ayers* provides a vivid contrast to the abbreviated treatment accorded the liability phase of this case by the three-judge court. The court in *Ayers* held a five-week bench trial, heard testimony from 71 witnesses and received 56,700 pages of exhibits. *Id.* at 1526. With the exception of the reference to enhancement dollars spent by Louisiana, the trial court in the instant case made limited reference to the affirmative action in which Louisiana engaged. Similarly, in Alabama's higher education desegregation case, the court conducted a month-long trial and made detailed findings. *Alabama*, 828 F.2d at 1535-36.

[24] *See Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C.), *modified*, 480 F.2d 1159, 1164 (D.D.C. 1973). Ten states have been identified for federal scrutiny of their compliance with Title VI. This scrutiny has continued for over fifteen years. *See, e.g., Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987), *rev'd sub nom. Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989).

Although the conclusions are opposite, *Green* and *Bazemore* are consistent. Attendance in elementary and secondary school is compulsory; membership in a university-sponsored club is not. Five Justices of this Court in *Bazemore* reasoned that a state maintains significantly more control over elementary and secondary school enrollment than over voluntary club membership and is, therefore, in a position to achieve substantially greater integrative results, as measured solely by racial composition. *Bazemore*, 478 U.S. at 409 (White, J., concurring). The element of free choice dramatically limits this control. Students enrolled in public higher education exercise similar free choice when they decide which college to attend or even whether to attend college at all. There is, however, no Supreme Court precedent directly on point insofar as public higher education is concerned.

The parties to this lawsuit do not question that the State, having once maintained a *de jure* system of public higher education, has an affirmative duty to eliminate vestiges of that system.[25] All of the defendants, however, including predominantly black Southern University,[26] contend that this duty was satisfied by opening Louisiana's schools to students of all races and by other substantial affirmative action measures employed by the State for more than a quarter century. Affidavit of Sharon Beard dated May 12, 1988 ("Beard Affidavit"), Appendix at 127a.[27] *See also infra* note 31. Indeed, all

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[25] *See Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977), *cert. denied*, 449 U.S. 870 (1980). *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, *reh'g denied*, 403 U.S. 912 (1971).

[26] *See* Jurisdictional Statement of Southern University (No. 89-577) at 26-28.

[27] "Since the effective date of Title VI . . . Louisiana has had a policy of open admissions for students of all races. Any graduate of a state-approved Louisiana high school is entitled to enroll at a public institution of higher education, without regard to the student's high school grade point average or scores on standardized tests." Beard Affidavit, Appendix at 127a.

parties to this action, including the Government, agree that the *Bazemore* reasoning is critical in measuring efforts made by the State in the context of public higher education desegregation.[28] The issues presented in this case, therefore, provide the Court with the timely opportunity, at last, to clarify the scope of a state's affirmative duty to disestablish a formerly *de jure* system of public higher education.

B. Racial Identifiability Alone Does Not Create A Dual System But Must Be Considered In Light of the Circumstances

This Court, in *Green*, correctly recognized that "[t]here is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present . . . ." *Green*, 391 U.S. at 439.

In determining liability, the three-judge court chose to rely inflexibly and exclusively upon the standard of liability first established in *Green*, without giving appropriate consideration to the circumstances surrounding public higher education. *Louisiana*, 692 F. Supp. at 656, Order and Reasons I, Joint Appendix at 30a-31a. By so doing, the court found the State liable solely because the racial composition of its public institutions of higher education was identifiably white and identifiably black. *Id.* at 657, Order and Reasons I, Joint Appendix at 33a. The racial mix litmus test applied in *Green*, however, while wholly appropriate for elementary and secondary school desegregation cases, cannot logically be applied here. Attendance at public elementary and secondary schools is compulsory. Students attend free of tuition

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[28] *See* Motion of the United States for Summary Judgment on the Issue of Liability, Joint Appendix at 285a-86a. The three-judge court noted that the Government's reliance on *Bazemore* was curious because if the *Bazemore* standard had been applied the State would not have been held liable for violating Title VI. *Louisiana*, 692 F. Supp. at 656 n.70, Order and Reasons I, Joint Appendix at 30a.

and academic programs are, by and large, fungible.[29] States maintain control over public elementary and secondary schools by empowering school boards to create school attendance areas and "otherwise [to] designate the school that particular students may attend." *Bazemore*, 478 U.S. at 408 (White, J., concurring). Desegregation in that context, therefore, is merely a function of whether the buses roll. Such control is not available in public higher education where attendance is voluntary, tuition is charged and programs are diverse.

The circumstances in higher education are inherently and fundamentally different from those in elementary and secondary education because student choice is such an important determining factor. As early as 1969, this Court acknowledged the distinction when it affirmed a three-judge court decision which recognized the effect of student choice in higher education. The lower court in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784, *aff'd*, 393 U.S. 400 (1969) ("*ASTA*"), observed:

> Public elementary and secondary schools are traditionally free and compulsory. . . .
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> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements . . . .

289 F. Supp. at 787-88.

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[29] Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive toward uniformity in offerings, facilities and services. The opposite is true in higher education. . . . Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.

Ayers, 674 F. Supp. at 1554.

Additionally, the ASTA Court emphasized the importance of Alabama's good faith in assessing its affirmative duty, a consideration of little or no consequence in the context of elementary and secondary education: "As long as the [S]tate and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." *Id.* at 789, 790. Here, the trial court failed to accord any weight to the State's good faith implementation of substantial affirmative action measures.

A majority of this Court also recognized the significance of free choice in *Bazemore*. There, five Justices observed that disestablishing segregated 4-H and Homemaker clubs and opening these clubs to any eligible person, regardless of race, was sufficient action by the defendant, the North Carolina Extension Service, to satisfy the Constitution. *Bazemore*, 478 U.S. at 408 (White, J., concurring). These Justices assessed the effectiveness of the defendant's open membership policy in reaching this conclusion and did so in light of the circumstances surrounding the case, an analysis perfectly consistent with *Green* and the principles of good faith and free choice identified in *ASTA*. They took into consideration that there was no evidence of racial discrimination in membership, policy or qualifications and cited the district court's finding that any racial imbalance which may have existed after the clubs were opened "was the result of wholly voluntary and unfettered choice of private individuals." *Bazemore*, 478 U.S. at 407 (White, J., concurring).

Public higher education, like the clubs in *Bazemore*, is voluntary and noncompulsory. College students may choose to attend whatever school they wish, public or private, in-state or out, regardless of their race and for whatever reasons they wish. Students may even choose not to attend college at all. Under these circumstances, which *Green* says must be considered, racial identifiabil-

ity alone in a state's public higher education system does not violate Title VI or the Fourteenth Amendment any more than did the racial identifiability of the clubs in *Bazemore*.[30]

The standards in *Green* and *Bazemore* are consistent and must be read together. As instructed in *Green*, the district court should have evaluated the circumstances which surround Louisiana public higher education to assess correctly the effectiveness of the numerous measures implemented by the State to dismantle Louisiana's formerly *de jure* system. Had the trial court undertaken such an analysis for Louisiana, it would have found no liability.

C. Louisiana Has Satisfied Its Affirmative Duty And Has Created A Unitary System Of Public Higher Education Even Under The Trial Court's Literal Application Of *Green*

Even if the three-judge court's inflexible application of *Green* to the instant case were correct, it should have found for the State. In an effort to comply with its responsibility to effectuate a transition from a *de jure* system to a unitary system, the respondent school board in *Green* adopted a "freedom of choice" plan for desegregating the public elementary and secondary schools. *Green*, 391 U.S. at 433-34. The effectiveness of the *Green* plan was measured by observing the continued racial segregation in the schools three years after the plan had been in effect. *Id.* at 441. Because no white student chose to attend the all black school, and because only 15% of the black students enrolled in the system attended the previously all white school, this Court held that the plan did not satisfy the school board's duty to dismantle the dual system. *Id.*

Here, however, unlike *Green*, 56.4% of black Louisiana students who enrolled in a Louisiana public college or uni-

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[30] "[T]he mere continued existence of single-race clubs does not make out a constitutional violation. As the District Court found, one's choice of a Club is entirely voluntary." *Bazemore*, 478 U.S. at 408 (White, J., concurring).

versity in 1988 enrolled in a predominantly white institution. *Louisiana*, 718 F. Supp. at 506, Opinion and Order, Joint Appendix at 47a. *See also* Statewide Student Profile System, 1987-88 ACT Data, Report II, State's Exhibit 6(b), admitted at hearing before Special Master March 14, 1989, Appendix at 200a. For example, in the fall of 1988, LSU's Baton Rouge campus, LSU-A&M, enrolled almost 2,000 black students and the University of New Orleans, a constituent institution of LSU, enrolled almost 2,500 black students. *Louisiana*, 718 F. Supp. at 504, Opinion and Order, Joint Appendix at 43a. Overall, more than 5,000 black students were enrolled in the LSU system in 1988. *Id.* In 1988, Trustees' constituent institutions enrolled more than 16,700 black students, and more than 11,000 black students, even if predominantly black Grambling's black enrollment is excluded from the count. *Id.* Although the Southern University system and Grambling enrolled far fewer numbers of students in 1988 than either LSU or Trustees, more than 1,000 white students chose to enroll in these institutions during that year. That number is more than three times as many as had enrolled in 1981. *Id.* Moreover, from 1981 to 1988, white membership on Southern University's Board of Supervisors increased from 12% to 24%; black membership on Trustees' Board increased from 12% to 29%; black membership on LSU's Board increased from 6% to 24%; and, in 1988, 20% of Regents' membership was black. Beard Affidavit, Appendix at 125a.

Even the most casual observer would have to conclude that both black students and white students fully appreciate that all public institutions of higher education in Louisiana are open to students of both races. Indeed, the State accomplished far more than merely instituting a "freedom of choice" plan.[31] Considering these statistics

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[31] As part of the State's affirmative action plan, Regents prepared and disseminated no less than 12,000 informational brochures and pamphlets from 1982-83 through 1987-88 designed to encourage other-race students to apply for admission to the various public

and the extraordinary measures taken by the State to desegregate further its colleges and universities, the trial court should not have found the State liable for violating Title VI, even under that court's flawed application of *Green*.

II. MERGER

The ordered merger of the LSU Paul M. Hebert Law Center and the Southern University Law Center was

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institutions. Beard Affidavit, Appendix at 130a. Student recruitment programs designed to attract other-race students were developed by each institution and submitted to Regents. *Id.* at 131a. Regents recommended annually to the Governor and the legislature that additional monies be appropriated to predominantly black institutions for other-race recruitment as follows: Southern University in Baton Rouge, $143,294; Southern University in New Orleans, $50,095; Southern University in Shreveport, $26,000; Grambling, $99,000. These funds for other-race recruitment activities were appropriated from 1982 through 1987. *Id.* at 132a. Regents developed and adopted a policy to ensure that no Louisiana public institution of higher education would be denied equal access to public high schools to conduct student recruitment activities. *Id.* at 133a. A total of 62 new academic programs were approved by Regents for implementation at predominantly black institutions. By June 7, 1988, 19 such new programs were put into place at Southern University in Baton Rouge, 14 at Southern University in New Orleans, 18 at Grambling and 11 at Southern University in Shreveport. *Id.* at 136a. In 1982-83, the legislature appropriated $685,210 in outside-the-formula funds to predominantly black institutions for new academic program support; $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87 and $13,011,782 in 1987-88. *Id.* at 137a. Each fiscal year from 1982-83 through 1987-88, Regents recommended $70,000 for Grambling and $230,000 for the Southern University system for faculty development. *Id.* at 139a. In addition to the above-mentioned commitments, the defendants undertook a series of programs designed to promote integration in Louisiana's institutions of public higher education: employing an individual primarily responsible for recruitment of other-race students; recruitment activities at high schools having substantial other-race enrollment; development of a recruitment plan containing specific strategies for attracting other-race students; airing public service announcements; utilizing lists obtained by Regents to recruit other-race students by direct mail; and development of cooperative plans including faculty and student exchange programs. *Id.* at 144a.

without factual basis and contravened the fundamental requirements of due process.

The three-judge court ordered the merger of Louisiana's two state-supported law schools, the LSU Paul M. Hebert Law Center and Southern University Law Center. *Louisiana*, 718 F. Supp. 513-14, Opinion and Order, Joint Appendix at 60a-62a. No party recommended that remedy, no party presented the issue of law school merger to the Special Master or trial court and no evidence was taken regarding the feasibility, appropriateness or educational soundness of such a merger.

It is true that a district court "has broad power to fashion a remedy" in desegregation cases. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Such power is not without limitation, however. One such limitation is that imposed by the due process clause of the Fifth Amendment. "The essential requirements of due process . . . are notice and opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). *See also Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Furthermore, "[t]he formality and procedure requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). *See also Cleveland Bd. of Educ.* 470 U.S. at 545.

Consequently, although the "formality and procedure . . . for a hearing can vary," at least some hearing, embodying the fundamental elements of due process, is required. That did not occur here. This Court's reasoning in *Bradley v. School Board*, 382 U.S. 103 (1965), is instructive. There, the district court had approved certain plans for desegregating a public school system without a full inquiry into the petitioners' contention that faculty allocation on an alleged racial basis had an adverse impact on those plans. The court of ap-

peals affirmed, reasoning that the district court "has a large measure of discretion." This Court, reversing, held that "petitioners were entitled to [a] full evidentiary hearing . . . ." *Bradley*, 382 U.S. at 105.

Similarly, here, no evidence was introduced regarding the effect that merger would have on Louisiana's two state-supported law schools. Not only was there not a full inquiry, there was no inquiry. Indeed, absent any hearing whatsoever, there could have been no findings regarding the effect the law school merger would have had in the effort to desegregate further Louisiana's public institutions of higher education.

Given the importance of legal education to the people of the State of Louisiana and to the students, faculty and staff of the affected institutions, this Court should consider whether this aspect of the trial court's order is procedurally flawed. That question, too, is substantial.

CONCLUSION

Confusion over the legally appropriate racial demographics for predominantly black and predominantly white institutions has been and remains the norm.

In 1978, during the height of the federal Title VI higher education enforcement effort, David A. Tatel, former Director of the Department of Health, Education and Welfare's ("HEW's") Office for Civil Rights, described Title VI compliance as when "*enough* blacks attend[] the white schools and *enough* whites attend[] the black schools . . . ." Tatel, *HEW's Voice in College Crisis*, Virginia-Pilot, Ledger-Star, Dec. 10, 1978, at C1, col. 1 (emphasis added), Appendix at 174a. Since that time, colleges and universities throughout the South have continued to receive similarly insightful direction from HEW's successor, the Department of Education, and from the Department of Justice.[32]

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[32] At trial, Government and Southern University witnesses reasoned the appropriate other-race compositions to be, variously, 25%-30% white in the predominantly black institutions to 25%-30% black in the predominantly white institutions, Deposition of

Confusion over legal standards for Title VI compliance in higher education have plagued the Government, the higher education community and the courts. The major barrier to the establishment of unitary school systems in the South has been the question of how to treat those institutions which were formally all black.[33] Issues of

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Clifton Conrad taken February 6, 1989, Appendix at 155a; 40% white in predominantly black Southern University in New Orleans, Deposition of Robert Gex taken February 16, 1989, Appendix at 161a; 20%-30% white at predominantly black Southern University in Baton Rouge over fifteen to twenty years and minimum 15% black in predominantly white institutions, Deposition of Dr. Dolores Spikes taken February 28, 1989, Appendix at 169a.

The only documented effort by the HEW and Department of Education to spell out the ingredients of compliance was the issuance of criteria to be applied to the formerly *de jure Adams* states. *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6,658 (1978), Joint Appendix at 862; *Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 42 Fed. Reg. 40,780 (1977), Appendix at 97a. (referred to as "*Criteria*" unless otherwise specified). The soundness of these *Criteria*, however, has not been approved by any court and the regulatory process by which they were developed was flawed. *See* State of Louisiana Opposition to Application for Stay Filed by Southern University and Motion for Stay Filed by Louisiana Attorney General (corrected copy) (Nos. A-126 and A-127) (filed Aug. 14, 1989), Appendix at 49a.

[33] The Government has had its own problems in articulating its intentions toward predominantly black institutions:

> Well, Your Honor, there is no truth to the fact that we are trying to eliminate the black institutions. What we are trying to do is to eliminate the identifiability as black institutions of the black institutions. Your Honor, this is a difficult concept and we acknowledge that it's not an easy concept. . . . It's not an impossible concept though.

Mandel v. U.S. Dep't of Health, Educ. and Welfare, 411 F. Supp. 542, 553 (D. Md. 1976), *aff'd by an equally divided court sub nom. Mayor of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1977), *cert. denied*, 439 U.S. 862 (1978). This same district court characterized the Government's conduct in its Title VI efforts against Maryland as "outrageous," "unreasonable," "startling," "perplexing," "duplicitous," "arbitrary," "cavalier," "uncooperative," "paradoxical" and "capricious." *Id.* at 548-63.

liability and remedy have been addressed by different courts in decidedly different ways. *See, e.g., Ayers v. Allain*, 674 F. Supp. 1523, 1552-54, 1558 (N.D. Miss. 1987), *appeal docketed*, No. 88-4103 (5th Cir. Feb. 11, 1988) (no liability found despite racial identifiability because racial composition resulted from free and unfettered choice by individual students); *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, 597 F.2d 1056 (6th Cir.), *cert. denied sub nom.* 444 U.S. 886 (1979) (merger of proximately located predominantly black institution and predominantly white institution ordered); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom. Board of Visitors v. Norris*, 404 U.S. 907 (1971) (state enjoined from expanding from two to four years predominantly white institution located in geographic proximity to four-year predominantly black institution); *ASTA v. Alabama Public School and College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (predominantly white institution permitted to establish four-year institution in same community as predominantly black institution).[34]

Much of the confusion over the treatment to be accorded predominantly black colleges and universities stems from *dicta* taken from the early rulings in the so-called *Adams* cases:

> "These Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education." The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education.

Adams v. Califano, 430 F. Supp. 118, 120 (D.D.C. 1977) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973)). Efforts to accommodate this concept,

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[34] *See also Artis v. Board of Regents*, No. CV 479-251, slip op. at 7 (S.D. Ga. Feb. 2, 1981), Appendix at 195a ("the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts").

while requiring an undefined mix of white students at predominantly black institutions, have, contrary to the Government's view,[35] turned out to be more than difficult. They have been impossible.

Only this Court is in a position to resolve the question of the appropriate standard by which these efforts are to be judged. The State, Regents, Trustees and LSU urge the Court to assume jurisdiction of this case and order a full examination of the questions presented.

Respectfully submitted,

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[35] *See supra* note 33.